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No. 84-1440

In The
Supreme Court of the United States

October Term, 1984

Alwin E. Hopfmann, Gregory Hession, Clarence Perkins, Clarence Paulin and Beth Sullivan,
Appellants,
v.
Michael Joseph Connolly, Francis X. Bellotti, Chester G. Atkins, and the Democratic State Committee of Massachusetts,
Appellees.

On Appeal From The United States Court of Appeals For The First Circuit

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Motion Of Respondents Connolly And Bellotti To Dismiss The Appeal Or To Affirm The Judgment Of The United States Court of Appeals For The First Circuit Or, In The Alternative, Brief In Opposition To The Petition For A Writ Of Certiorari

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I. QUESTIONS PRESENTED

1. Whether, in light of this Court's prior disposition of the issues in Bellotti v. Connolly, 460 U.S. 1057 (1983), a substantial federal question now exists concerning the validity of the Massachusetts statutory scheme for obtaining access to the state primary ballot under the First and Fourteenth Amendments to the United States Constitution.

2. Whether the Massachusetts statutory scheme for obtaining access to the state primary ballot violates Article One, Section Four of the United States Constitution.

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III. MOTION TO DISMISS OR TO AFFIRM THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Pursuant to Rule 16 of the Rules of this Court, respondents Connolly and Bellotti move that the appeal be dismissed or that the judgment of the United States Court of Appeals for the First Circuit be affirmed on the ground that it is plainly correct and the questions presented by the jurisdictional statement are so unsubstantial as not to warrant further argument.[1/]

1/ The appellants have sought to invoke the appellate jurisdiction of this Court pursuant to 28 U.S.C. §1254(2), claiming that a statute of the Commonwealth of Massachusetts has been declared repugnant to the Constitution of the United States by the Court of Appeals. The respondents, Connolly and Bellotti, respectfully submit that no state statute has been

IV. STATEMENT OF THE CASE

This action challenges both a party rule and the Massachusetts statutory scheme which incorporates it and which limits access of candidates for statewide office to the Democratic primary ballot. The appellant, a candidate for the Democratic nomination for the office of United States Senator in 1982, and four of his supporters primarily attack the constitutionality and validity of the

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Footnote Continued:

1/ invalidated and therefore the appellate jurisdiction of this court has been improperly invoked. They, therefore, request that this submission be treated, in the alternative, as a Brief in Opposition to a Petition for a Writ of Certiorari.

so-called "15% Rule" [2/] of the Massachusetts Democratic Party. That rule which has essentially been incorporated into the state statutory scheme, requires candidates for statewide office to obtain at least 15% of the votes on any ballot at the state nominating convention. The rule was given effect by the State Secretary who refused to

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2/ Article Six, Section III of the Charter of the Massachusetts Democratic Party was amended in 1979, so as to read in pertinent part: "Endorsements for statewide office of enrolled Democrats nominated at the Convention shall be by majority vote of the delegates present and voting, with the provision that any nominee who receives at least 15% of the convention vote on any ballot for a particular office may challenge the convention endorsement in a State Primary election."

This rule is commonly referred to as the "15% Rule."

place the names of any candidates for statewide office on the primary ballot who had failed to obtain the necessary convention vote.

The appellant, Mr. Hopfmann, failed to obtain 15% of the convention vote in 1982 and challenged the statutory scheme on several constitutional grounds. The United States District Court for the District of Massachusetts considered motions to dismiss filed by the various defendants and plaintiffs' motion for summary judgment. Judgment was granted in favor of all defendants with express reliance upon this Court's summary disposition of an earlier case which originally involved the present respondents on opposite sides of a dispute over the validity of the system at issue here.

Bellotti v. Connolly, 460 U.S. 1057 (1983). (App. Vol. 1 p. OB 35). An appeal was taken to the United States Court of Appeals for the First Circuit. On October 22, 1984 the judgment of the District Court was upheld in all respects. Hopfmann v. Connolly, 746 F.2d 97 (1984). The appellees now seek plenary review of the very issues which were before this Court just two years ago.

V. ARGUMENT

A. The Massachusetts Statutory Scheme Does Not Now Present Substantial Questions Concerning Its Consistency With The First And Fourteenth Amendments

The Massachusetts General Laws provide certain requirements concerning the nomination of candidates at primary elections. Candidates must be enrolled members of the party whose nomination they seek. Mass. Gen. Laws c.53, §48. To obtain a place on the primary ballot for nomination to a state-wide office, they must file 10,000 signatures of voters who are members of the party or who are not members of any other party. Mass. Gen. Laws c.53, §44. The actual nomination of the candidates must take place at a state primary election. Mass. Gen.

Laws c.53, §§ 2 and 41, but candidates may appear on the primary ballot of the Democratic Party only if they satisfy the 15% rule.

In a prior state proceeding it was first claimed that the only requirements for gaining access to the Democratic state primary ballot were those expressly set forth in the state statutes and that the party rule could not be invoked to exclude from the ballot candidate who had met those statutory criteria. Langone v. Secretary of the Commonwealth, 388 Mass. 185, 446 N.E. 2d 43 (1983). The Supreme Judicial Court rejected that argument and conclusively construed the Massachusetts statutory scheme as encompassing the 15% Rule of the state Democratic Party. "[W]e treat the Rule as though it were

expressly contained in Mass. Gen. Laws c.53". Langone, 388 Mass. at 195, 446 N.E. 2d at 48. That determination is simply not open to challenge; the highest court of a state is the final expositor of the meaning and operation of state law. Any construction or interpretation offered by the highest state court is binding upon any federal court construing the same statute. Kolender v. Lawson, 461 U.S. 352, 355-356 (1983); Schad v. Borough of Mount Ephraim, 452 U.S. 61, (1981). Brown v. Ohio, 432 U.S. 161, 168 (1977). The 1982 opinion of the Supreme Judicial Court of Massachusetts did not stop with an exposition of state law. The court went on to consider the constitutionality of the 15% Rule in a context identical to that presented by this appeal. The second claim advanced

by Mr. Langone, who like the current petitioner was thwarted in his effort to be on the ballot by application of the 15% rule, was that the 15% rule unconstitutionally restricted his right of access to the primary ballot.

The Supreme Judicial Court concluded that the 15% Rule did not impose a substantial burden on the exercise of the right of political association and that the statutory scheme need only be subject to a "rationality test." Langone, 388 Mass. at 197 446 N.E. 2d at 50. The court then concluded that the rule was rationally related to the goal of protecting the integrity of the political party by insuring that only candidates with a reasonable modicum of support from party members with substantial party affiliation emerge as the nominee for

important public offices. Langone 388 Mass. at 198 446 N.E. 2d at 47.

Appeals were taken from this decision to the United States Supreme Court.[3/] They were dimissed on April 4, 1983 for want of jurisdiction. Bellotti v. Connolly, 460 U.S. 1057 (1983).

The summary disposition of these appeals was deemed by the lower courts to be conclusive precedent on the issue raised by Mr. Hopfmann concerning his First and Fourteenth Amendment freedoms.

3/ Separate appeals were filed by Langone and Attorney General Bellotti, a current respondent. The arguments advanced then by the Attorney General were rejected and his appeal to this Court was dismissed for lack of jurisdiction. Bellotti v. Connolly, 460 U.S. 1057 (1983). Accordingly, the Attorney General has undertaken his customary representation of the State Secretary and the defense of state statutes as construed by the highest state court.

Both the District Court and the Court of Appeals for the First Circuit relied upon the summary disposition in rejecting Mr. Hopfmann's arguments.

The lower courts were correct in relying on the fact that this court has already decided that the 15% Rule does not constitute a denial or infringement on a candidate's or his supporters' right to vote or to associate for political purposes. It is therefore respectfully submitted that the argument raised by Mr. Hopfmann alleging that the 15% Rule unconstitutionally infringes on his right of political association has already been conclusively resolved and need not be addressed by the Court again.

B. <u>The Courts Below Correctly Found That The Massachusetts Statutory Scheme Does Not Violate Article One, Section Four of the United States Constitution.</u>

Mr. Hopfmann has raised a separate challenge to the 15% Rule based upon Article One, Section Four of the United States Constitution. He alleges that the constitution allows state legislatures to set the "time, place and manner" of elections, but that this provision does not allow the states to delegate this function to political parties.

This argument presents no substantial federal question, as it is based upon an overly restrictive interpretation of the word "legislature" as found in Article One, Section Four.

This Court has interpreted the term more broadly to include the entire state legislative process.

In the case of Smiley v. Holm, 285 U.S. 355 (1932), for instance, this Court held that in considering the meaning to be given the term "legislature" as used in the constitution it is "necessary to consider the nature of the particular action in view." Id. at 366. Based upon the broad purpose that the state legislatures were to serve in setting the "time, place and manner" of congressional elections, this Court concluded that the "exercise of the authority must be in accordance with the method which the state has prescribed for legislative enactments." Id. at 367-368.

Clearly Article One, Section Four allows the state to follow the usual course in enacting legislation governing federal elections. In Massachusetts, that legislation, as enacted by the General Court, is subject to interpretation by the Supreme Judicial Court and interpretations of state statutes offered by that court are binding to the meaning and operation of the statute.

The Massachusetts statutory scheme provides a comprehensive set of minimum requirements necessary to obtain primary ballot access. Langone v. Secretary of the Commonwealth, 388 Mass. 185, 446 N.E. 2d at 43 (1983). That statutory scheme accomodates and includes the 15% Rule of the Democratic Party. 388 Mass. at 194, 446 N.E. 2d at 51. The validity of the rule and the right of the party to add

to the statutory minimum set by state statute has been expressly upheld by the highest state court. There can now be no question that the Massachusetts statutory scheme includes the addition of the 15% Rule by the State Democratic Party. Langone, supra.

Mr. Hopfmann has argued that the delegation of such a legislative function to a political party is itself unconstitutional. This argument too, fails to present a substantial federal question and numerous cases from other jurisdictions have upheld the involvement of political parties in augmenting the statutory requirements for ballot access or in playing a direct role in the selection of party nominees. There is no split of authority between those jurisdictions. See Skeen v. Hooper, 631 F.2d

707 (10th Cir. 1980), Clark v. Rose, 379 F.Supp. 73 (S.D. N.Y. 1974), Tansley v. Grasso, 315 F.Supp. 513 (D. Conn. 1970), Yuratich v. Plaquemines Prish Democratic Executive Committee, 32 So.2d 647, (La. 1947).

It is clear that Massachusetts could have expressly made the 15% Rule part of the operable statutory scheme. The rule has been conclusively made part of the election process by the Langone decision. That interpretation, and the effect of that interpretation, are part of the Massachusetts legislative process. Accordingly, the 15% Rule has been promulgated and enforced pursuant to the state's power to establish the "time, place and manner" for conducting congressional elections.

VI. CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the First Circuit should be summarily affirmed and the respondents appeal dismissed. To the extent that the respondents pleading is treated as a Petition for a Writ of Certiorari, it should be denied.

Respectfully submitted,

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DATED: April 12, 1985

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CERTIFICATE OF SERVICE
UNDER RULE 28

I hereby certify that I am a member of the bar of this Court, and that I have served, three copies each, by Express Mail, postage prepaid, this 11th day of April, 1985, true and accurate copies of this Motion of Respondents Connolly and Bellotti To Dismiss the Appeal Or To Affirm The Judgment Of The United States Court of Appeals For The First Circuit, or in the alternative, Brief in Opposition To The Petition For A Writ of Certiorari upon Laurence A. Elgin, Esq., 2762 Woodley Place, N.W., Washington, D.C. 20008, Lawrence J. Ball, Esq., Ten Tremont Street, Boston, Massachusetts 02108, Fred Goldstein, Esq., 120 S. University Drive, Plantation, Florida 33324 and James F. Schoener, Esq., 2555 M Street, N.W., Washington, D.C., 20008 and Keith Long, Esq., Herrick and Smith, 100 Federal Street, Boston, Massachusetts 02110.

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